Comment on Recent Cases

ANIMALS: KILLING OF DOG: ACTION FOR DAMAGES.—The progress in the evolution of the dog in the last four hundred years from a position of one branded as *ferae naturae* to the respectable status of personal property, has received a severe check at the hands of Judge Kerrigan in the case of *Sabin v. Smith*.[1] The causa causans was a valuable Russian wolf hound, who forgetting himself for the moment entered the defendant's poultry yard, was caught chasing a chicken and shot. The defendant relied on section 3341 of the Civil Code, on the old defense that an Englishman's house is his castle, and on the principle that the law from the earliest days has recognized the right of a man to defend his property against the unlawful act of man or beast.

The owner of the deceased animal, pointing to the omission of poultry in the code section, argued that the legislature intended that a dog might be killed only for worrying or killing of sheep, or angora and cashmere goats. The court held, however, that the provision for such a remedy with reference to sheep and goats cannot be said to deprive the owner of fowls of a similar right where the necessity for the killing is apparent.

Undoubtedly the judge expresses the opinion of the common law, though there are dicta contra,—as, "if the dog merely chases and bites an animal, in order to justify killing the dog, it is necessary to show that he could not otherwise be separated".[2] That the learned judge who wrote the opinion in the principal case looked upon dogs as dogs, is clear by this sentence: "The claim that the dog killed was possessed of a pedigree and had a greater relative value than the fowl injured and that therefore the killing was unwarranted, is without merit". But dogs today are classed with other personal property[3] and one look at a modern stock book would show the place of pedigree and its influence on valuation.[4]

The existing differences in dogs should be considered. With this in mind, and remembering the old adage, "a dog is like a man

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[1] (Feb. 27, 1915), 20 Cal. App. Dec. 376.

[2] Wright v. Ramscot (1666), 1 Wms. Saund. 84, 85 Eng Repr. 93; In re Ackerman (1907), 6 Cal. App. 5, 91 Pac. 429.

[3] Dodson v. Mock (1838), 20 N. C. 282, 32 Am. Dec. 677; Perry v. Phipps (1849), 32 N. C. 259, 51 Am. Dec. 387; State v. Smith (1911), 156 N. C. 628, 72 S. E. 321, Cal. Pen. Code, § 491.

[4] Citizens Rapid Transit Co. v. Dew (1890), 100 Tenn. 317, 45 S. W. 290, 40 L. R. A. 518, 66 Am. St. Rep. 745; Heiligmann v. Rose (1891), 81 Tex. 222, 26 Am. St. Rep. 804; 1 R. C. L. 1130; Johnson v. McConnell (1889), 80 Cal. 545, 22 Pac. 219.

in one respect at least, that is, he will do wrong sometimes and if the wrong is slight and trivial, he does not thereby forfeit his life", there might have been more clemency in the present decision.[5] Here was a pedigreed hound worth $350 shot for a chicken worth perhaps fifty cents. If a man found a cat killing his chickens, no one would question his right to shoot it. But suppose his neighbor's valuable horse crushed one of his fowls, would he have the same privilege? While from the record it does not appear that the defendant was aware the hound was pedigreed, the average person knowing that the Russian wolf hound is unusual in size and noble in appearance, would forbear to shoot.

The general rule of law is that there must be an apparent necessity for the defense, honestly believed to be real, and then the acts of defense must themselves be reasonable,—acts beyond reason being excessive.[6] While it is true that the owner could hardly be expected to stand by and mentally calculate the value of the chickens destroyed and await action until such value approximately equaled that of the dog, nevertheless the reasonable, the natural thing to have done would seem to be something just as effective but less drastic, as for example an action in damages against the trespasser's owner.

L. G.

BOOK ACCOUNTS: OPEN AND STATED ACCOUNTS: STATUTE OF LIMITATIONS.—The rule laid down by the courts of this state in regard to open accounts is that when rendered by the merchant and not objected to by the debtor, the assent of the latter is presumed after the lapse of a reasonable time, and the open account is superseded by the stated account or account rendered. Upon this stated account the merchant may bring an action within the two years prescribed by the statute of limitations.[1] However, after the extension of the statute of limitations[2] on open book accounts to four years by the amendment of 1907, it was the general opinion of the merchants that they could sue upon the account any time within the four years, even though they had rendered accounts to which no objection had been made. This opinion, though it appears to have been well founded upon the decisions in other jurisdictions,[3] was shattered by the decision of our Appellate Court in the case

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[5] Anderson v. Smith (1880), 7 Ill. App. 354.

[6] Livermore v. Batchelder (1886), 141 Mass. 179, 5 N. E. 275.

[1] Auzerais v. Naglee (1887), 74 Cal. 60, 15 Pac. 371; Kahn v. Edwards (1888), 75 Cal. 192, 16 Pac. 779, 7 Am. St. Rep. 141; Hendy v. March (1888), 75 Cal. 566, 17 Pac. 702; Baird v. Crank (1893), 98 Cal. 293, 33 Pac. 63; Mayberry v. Cook (1898), 121 Cal. 588, 54 Pac. 95; Converse v. Scott (1902), 137 Cal. 239, 70 Pac. 13; Atkinson v. Golden Gate Tile Co. (1913), 21 Cal. App. 168, 131 Pac. 107.

[2] Cal. Code Civ. Proc., § 337.

[3] Cross v. Moore (1851), 23 Vt. 482; Goings v. Patten (1863), 17 Abb. Pr. (N. Y.) 339; Buxton v. Edwards (1883), 134 Mass. 567; Johnson v. Tyng (1896), 1 App. Div. 610, 37 N. Y. Supp. 516.